IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 072904

BLUE EAGLE LAND, LLC a West Virginia limited liability company, COALQUEST DEVELOPMENT, LLC, a foreign limited liability company, CONSOLIDATION COAL COMPANY, a foreign corporation, HORSE CREEK LAND AND MINING COMPANY, a West Virginia corporation, NATIONAL COUNCIL OF COAL LESSORS, INC., a West Virginia corporation, PENN VIRGINIA OPERATING COMPANY, LLC, a foreign limited liability company, POCAHONTAS LAND CORPORATION, a foreign corporation, WEST VIRGINIA COAL ASSOCIATION, a West Virginia non-profit corporation, WPP LCC, a foreign limited liability company, and WOLF RUN MINING COMPANY, a West Virginia Corporation,

Petitioners,

v.

WEST VIRGINIA OIL & GAS CONSERVATION COMMISSION, a state agency, CHESAPEAKE APPALACHIA, LLC, a foreign limited liability company, EASTERN AMERICAN ENERGY CORPORATION, a West Virginia corporation, and PETROEDGE RESOURCES (WV), LLC, a foreign limited liability company,

Respondents.

WEST VIRGINIA OIL & GAS CONSERVATION COMMISSION'S ANSWERING BRIEF

I. Type of Proceeding

This is an original jurisdiction petition for writ of prohibition filed pursuant to Rule 14 of the Rules of Appellate Procedure asserting that the West Virginia Oil & Conservation Commission ("Commission") does not have authority to assert jurisdiction over gas wells

drilled more than 20 feet into the Onondaga Group. Petitioners further claim that without authority to assert jurisdiction over said wells, it follows that the Commission's legislative rules do not apply, and that any orders previously entered pursuant thereto, but not appealed through the administrative process, are invalid. In addition to seeking to invalidate the previously entered orders, Petitioners seek to prevent the Commission from acting upon pending applications. P. 27 of Petition for Writ of Prohibition.

II. Standard of Review and Background and Statement of the Case

A. Standard of Review

As the Court noted in *State ex rel. Johnson v. Reed*, 219 W. Va. 289, 293, 633 S.E.2d 234, 238 (2006):

> This Court has original jurisdiction in prohibition proceedings pursuant to Art. VIII, § 3, of The Constitution of West Virginia. That jurisdiction is recognized in Rule 14 of the West Virginia Rules of Appellate Procedure and in various statutory provisions. W. Va. Code, 51-1- 3 (1923); W. Va. Code, 53-1-2 (1933). In considering whether to grant relief in prohibition, this Court stated in the syllabus point of *State ex rel. Vineyard v. O'Brien*, 100 W. Va. 163, 130 S.E. 111 (1925), as follows: "The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction." Syl. Pt. 1, *State ex rel. Brison v. Kaufman*, 213 W. Va. 624, 584 S.E.2d 480 (2003); Syl. Pt. 1, *State ex rel. Laura R. v. Jackson*, 213 W. Va. 364, 582 S.E.2d 811 (2003); *State ex rel. Murray v. Sanders*, 208 W. Va. 258, 260, 539 S.E.2d 765, 767 (2000); *State ex rel. Barden and Robeson Corporation v. Hill*, 208 W. Va. 163, 166, 539 S.E.2d 106, 109 (2000).

B. Background and Statement of the Case

The Petitioners are coal-interest companies. While the Respondent Commission is vested with the specific statutory and rule making authority to regulate deep gas wells, the Shallow Gas Review Board ("Shallow Review Board"), which is not a named party, is

vested with specific statutory and rule making authority to regulate shallow gas wells. *See* W. Va. Code §§ 22C-9-1, *et seq*, and 22C-8-1, *et seq*., The Office of Oil and Gas, which is also not a named party, has general oversight of all gas wells. *See* W. Va. Code § 22-6-1, *et seq*.

Objections to drilling permit applications result in a hearing before the respective administrative agency and application of the respective well spacing provisions. Not only are the well spacing provisions different, depending on which agency has jurisdiction, but the legislative rules governing deep wells allow a gas operator to apply to the Commission for the establishment of special field rules. *See* 39 CSR 1. Special field rules dictate well spacing for a tract of land. In order to obtain a special field rule, gas operators must apply to the Commission and a hearing is held as a contested case in accordance with the Administrative Procedures Act requirements, which likewise apply when an objection is filed that results in a hearing.

The co-named Respondents are gas-interest companies that have either been granted or have applications for special field rules pending before the Commission. The four previously granted orders regarding special field rules, which involve tracts of land in various parts of the State, have not been appealed to any circuit court. One of the Petitioners (Pocahontas Land Corporation), has consistently filed and withdrawn objections, as reflected in three of previously entered special field rule orders. These are the very orders Petitioners seek to now invalidate. *See* Petitioners' Exhibits A, B, E, and G. At a hearing upon the pending applications, a joint continuance was granted by the Commission to delay action upon the pending special field rules applications in anticipation

of a possible legislative resolution. Prior to exhausting the possibilities of a legislative resolution, without any notice to the Commission, the Petitioners filed this writ of prohibition. After the Respondents filed responses to the same, the Court directed the Respondents to show cause as to why the writ of prohibition show not be awarded against the West Virginia Oil & Gas Commission.

III. Writ of Prohibition Should Not Be Issued

A. Jurisdiction Is Proper Where the Undisputed Facts Are Properly Applied to Clear and Unambiguous Statutes.

A writ of prohibition is an extraordinary remedy for use only in cases of necessity. *State ex rel. Gordon Memorial Hospital v. West Virginia State Bd. of Examiners for Registered Nurses*, 136 W. Va. 88, 66 S.E.2d 1 (1951). *See also Morris v. Calhoun*, 119 W. Va. 603, 195 S.E. 341 (1938). "It has long been the rule that prohibition will issue only in clear cases. *McConiha v. Guthrie, Judge*, 21 W. Va. 134 (sic); *Vineyard v. O'Brien*, 100 W. Va. 163, 130 S.E. 111." *Brown v. Arnold,* 125 W. Va. 824, 26 S.E.2d 238, 245 (1943). Syllabus Point 1, *State ex rel. Charleston Mail Ass'n v. Ranson*, provides that

> "'[T]his Court will use prohibition ... to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.' Syllabus Point 1, [in part,] *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979)." Syllabus point 1, in part, *State ex rel. DeFrances v. Bedell*, 191 W. Va. 513, 446 S.E.2d 906 (1994).

200 W. Va. 5, 6, 488 S.E.2d 5, 6 (1997).

1. Issues Not Relevant to Determining Jurisdiction

The Commission agrees that Petitioners raise the question of whether gas wells drilled and completed in the Marcelleus formation, which is a shale formation at the top of the Onondaga Group limestone formation, and drilled more than 20 feet into the Onondaga Group, are shallow gas wells or deep gas wells. However, the Commission does not agree that facts are not disputed with regard to approval of special field rules. Thus, while an initial determination must be made regarding whether a well is a shallow gas well or a deep gas well, the applications for special field involve disputed facts that differ from case to case. Petitioners' Exhibit W, the transcript from a hearing held upon an application for special field rules and objections filed by Petitioner Pocahontas Land Corporation, establishes that special field rules are factually based and subject to various technical and field-specific variables. See Petition at pp. 19-20. The Commission's application of special field rules to deep wells is irrelevant to whether wells drilled more than 20 feet into the Onondaga Group are deep wells. The Commission clearly has the authority to issue special field rules for wells meeting the deep well definition. See 39 CSR 2.19.

Attempts to tender facts to this Court that were not presented to the administrative agency during the agency hearings attended by Petitioner and not appealed despite participation in the hearings, should likewise not establish a basis upon which this Court concludes that the Commission does not have authority to regulate wells that are drilled more than 20 feet into the Onondaga Group. The time for presenting evidence about well spacing concerns was before the Commission. Without more, the Shallow Review Board allows a minimum of a 1000 feet between wells, which, at first glance, is no different than the spacing authorized in the previously entered special field rules orders. However, as

addressed above, the 1000 feet spacing in the entered orders was based upon facts specific to the tract in question. *See* W. Va. Code § 22C-8-7; *See also* W. Va. Code § 22C-8-8. *See also* Petitioners' Exhibits A, C, G, and E.

Petitioners presented no coal reserve or well spacing evidence, despite being present and participating. The statutorily directed well spacing disparity between shallow and deep gas wells does not demonstrate lack of jurisdiction. Rather, the regulation of deep well spacing falls directly within the authority of Commission and the Commission's orders have been consistent with the parameters used by the Shallow Review Board and justified by the evidence presented. *See* W. Va. Code § 22C-8-7 and § 22C-8-8; *See also* 39 CSR 6.1. This Court has drawn a bright line as a starting point for statutory construction: "a finding of ambiguity must be made prior to any attempt to interpret a statute." *Dunlap v. Friedman's, Inc.,* 213 W. Va. 394; 582 S.E.2d 841 (2003).

Moreover, suggestions that Petitioners are not provided with notice of hearings before the Commission or to take issue with orders previously entered should not establish a basis upon which this Court concludes that the Commission does not have authority to regulate wells that are drilled more than 20 feet into the Onondaga Group. *See State ex rel. Bobrycki v. Hill*, 202 W. Va. 335, 504 S.E.2d 162 (1998) (prohibition lies only to prevent the doing of an act, and can never be used as remedy for acts already done). Notice of hearing requirements not only differ from agency to agency and statute to statute, but Petitioners are provided notice at the initial permit application stage and prior to all hearings, albeit some are by direct notice and others are by published notice. Irrespective, Petitioners have lodged objections and attended and participated in hearings before the

Commission, which even Petitioners concede is a statutorily dictated quasi-judicial process. *See* Petition at p. 20. A party cannot create a need for interpretation of an unambiguous statute simply by advancing an argument in favor of interpreting it. *Estate of Resseger v. Battle,* 152 W. Va. 216, 220, 161 S.E.2d 257, 260 (1968).

Finally, Petitioners attempt to assert and introduce new facts, evidence and arguments that should have been raised before the Commission do not support a claim of lack of jurisdiction now. Rather, it appears to be a back door approach of usurping the Commission's jurisdiction without engaging in the administrative appeal process, which was clearly available. *See Lovejoy v. Callaghan*, 213 W. Va. 1, 1, 576 S.E.2d 246, 246 (2002) (administrative remedy must be exhausted before the courts will act); *See also State v. Newman*, 95 W. Va. 423 ,102 S.E. 122 (1920) (prohibition is a preventive remedy, and cannot be successfully invoked for review, annulment, rescission, or abrogation of a judicial proceeding that has been fully completed and ended).

2. Jurisdiction is Properly Before the Commission Because the Undisputed Facts are Applied and Reconciled With Unambiguous Statutes

As Petitioners concede, the first question is whether a well is deep well or a shallow well. *See* Petition at p. 22. It has to be one or the other. However, "[r]ules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it." *Crockett v. Andrews,* 153 W. Va. 714, 719, 172 S.E.2d 384, 387 (1970), *Deller v. Naymick*, 176 W. Va. 108, 112, 342 S.E.2d 73, 77 (1985). Under Petitioners' interpretation of the applicable statutes, so long as a well is not completed in the Onondaga Group, it is a shallow well. However, this argument does not apply provisions

specific to the Commission, over emphasizing a reliance upon the word "and." It also fails to acknowledge the specific and clear depth restrictions.

It is a long held maxim that "[t]ypically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails." *Bowers v. Wurzburg*, 205 W. Va. 450, 462 519 S.E.2d 148, 160 (1999). *See also Tillis v. Wright*, 217 W. Va. 722, 728, 619 S.E.2d 235, 241 (2005) ("[S]pecific statutory language generally takes precedence over more general statutory provisions."). The statutory definitions of shallow and deep gas wells are the same in the statutes governing the Office of Oil & Gas, the Shallow Review Board, and the Commission.

> "Shallow well" means any gas well drilled and completed in a formation above the top of the uppermost member of the "Onondaga Group": Provided, That in drilling a shallow well the operator may penetrate into the "Onondaga Group" to a reasonable depth, not in excess of twenty feet, in order to allow for logging and completion operations, but in no event may the "Onondaga Group" formation be otherwise produced, perforated or stimulated in any manner.
>
> "Deep well" means any well other than a shallow well, drilled and completed in a formation at or below the top of the uppermost member of the "Onondaga Group.

W. Va. Code §§ 22-6-1, 22C-9-2 and 22C-8-2. The Office of Oil & Gas and Shallow Review Board definitions of "well" are the same:

> "Well" means any shaft or hole sunk, drilled, bored or dug into the earth or into underground strata for the extraction or injection or placement of any liquid or gas, or any shaft or hole sunk or used in conjunction with such extraction or injection or placement.

W. Va. Code § 22-6-1(u) and W. Va. Code § 22-8-2(23).

The Commission's statutory definition of "well" simply states that "'Well' means any shaft or hole sunk, drilled, bored or dug into the earth or underground strata for the extraction of oil or gas." W. Va. Code § 22C-9-2(10). In addition and more importantly, the Commission's statute provides that " [u]nless the context clearly indicates otherwise, the use of the word 'and' and the word 'or' shall be interchangeable, as, for example, 'oil and gas' shall mean oil or gas or both." W. Va. Code §§ 22-6-1(g), 22C-9-2(a)(12) and 22C-8-2(8).

Looking first to the shallow well definition, the Commission agrees that a well that is drilled and completed above the top of the Onondaga Group is a shallow well. The Commission also agrees that the Marcellus formation is a shallow formation at the top of the Onondaga Group. The Commission further agrees that the shallow well definition has a specific and clear restriction regarding how far a shaft or hole used to extract gas can be put in the ground. So it follows that if a shaft or hole used to extract gas, which by definition is a well, penetrates into the Onondaga Group more than 20 feet, it is something other than a shallow well.

The deep well definition contemplates a well that is something other than a shallow well because it specifically and clearly applies to "any well other than a shallow well." W. Va. Code §§ 22-6-1(g), 22C-9-2(a)(12) and 22C-8-2(8). If a well does not fall within the clear statutory parameters defining a shallow well, it cannot by definition be a shallow well. However, the analysis does not stop there. The Commission's specific and mandatory statutory interchange of the word "and" and "or" places a well drilled more than 20 feet into the Onondaga Group squarely within the definition of a deep well.

When the undisputed facts are applied to a reconcilable reading of the applicable statutes, a well is not shallow when it exceeds the depth restriction clearly mandated by statute. *See State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.")

Here, the statutes are not ambiguous. The Petitioners do not assert that they are ambiguous; only that the Commission should not have jurisdiction because they do not want the Commission to regulate the spacing with special field rules. Without ambiguity, neither a search for the legislative intent in enacting it, nor judicial interpretation is warranted. *Webster County Commission v. Clayton*, 206 W. Va. 107, 522 S.E.2d 201 (1999).

IV. Conclusion

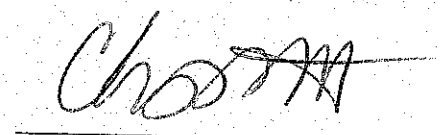
Based upon the foregoing, the Respondent West Virginia Oil & Gas Conservation Commission respectfully requests that this Court deny Petitioners' writ for prohibition, allowing the Commission to continue to regulate wells drilled more than 20 feet into the Onondaga Group.

RESPECTFULLY SUBMITTED:

West Virginia Oil & Gas Conservation Commission

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Christie S. Utt, Deputy Attorney General and counsel for the West Virginia Oil & Gas Conservation Commission, hereby certify that a true copy of "West Virginia Oil & Gas Conservation Commission's Answering Brief" was served upon the following counsel of record by depositing the same, postage prepaid, in United States first class mail this 14th day of February, 2008:

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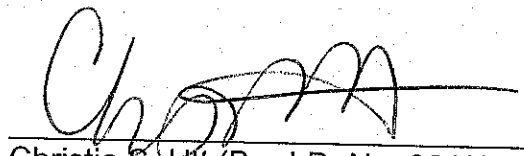

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